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Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing
Helena, MT 59620
(406) 449-2872

CASE # 28975

MEMORANDUM

The purpose of the Motion filed by the Applicant's counsel in this case is to "clarify" the Department's Final Order. This Motion, if granted, would require the Department to make substantive amendments to the Final Order.

The Department has held on a number of occasions, that once the Final Order issues, the Department no longer retains jurisdiction to rehear any portion of the case or make substantive amendments to the Final Order. For example, see, In re William P. Klein (Addendum to Final Order, dated December 7, 1982, a copy of which is attached hereto). The Applicant's Motion for Clarification is analogous to a Motion for Reconsideration (or Rehearing). As noted in In re Klein, supra, since the Department has not adopted a procedural rule allowing for rehearings, the Department has no statutory or inherent power to grant any rehearing. The same reasoning in Klein for Motions for Rehearing applies to Motions for Reconsideration. The Department has no procedural rules which would allow for the granting of a Motion for Reconsideration. Accordingly, the Applicant's Motion herein must be denied.

Even if the Applicant's Motion were not characterized as a Motion for Reconsideration (or Rehearing), the Department still would deny this Motion. The exception period has expired and the Department is without jurisdiction to significantly alter the Morse Final Order at this time. See generally, In re Klein, supra.

CASE # 28975

Kent's Copy

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	FINAL ORDER
RIGHT NO. 28975-c43C BY WILLIAM R.)	
MORSE)	

* * * * *

There being no exceptions or objections entered to the Proposal for Decision in this matter, the Department of Natural Resources and Conservation enters this Final Order. The Proposal for Decision as entered on April 15, 1983, is hereby adopted in its entirety as Final.

FINAL ORDER

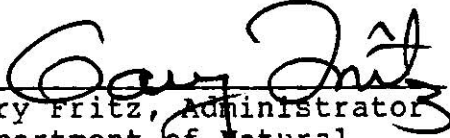
1. Application for Change of Appropriation Water Right No. 28975-c43C is hereby granted to William R. Morse to divert 1125 gallons per minute up to 300 acre-feet per annum from May 15 to November, inclusive, of each year from the East Fork of Fiddler Creek at a point in the NW1/4 NW1/4 SE1/4, Section 34, Township 5 South, Range 17 East, M.P.M., Stillwater County. Said waters are to be used on 30 acres in the NE1/4 NE1/4 of Section 34, Township 5 South, Range 17 East, M.P.M., Stillwater County. Waters diverted pursuant to this change are to be used for irrigation purposes. Notice: the approval of this change is not to be construed as recognition by the Department of the water rights

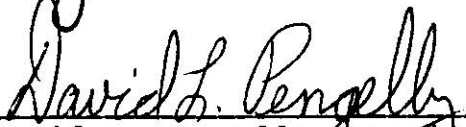
involved. All rights are subject to possible modification under the proceedings pursuant to MCA 85-2-201 et. seq.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 27 day of May, 1983.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 449 - 2872


David L. Pengelly, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

AFFIDAVIT OF SERVICE
FINAL ORDER

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Nicky J. Wylie, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 31, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by William R. Morse, Application No. 28975, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. William R. Morse, Attorney, Box 525, Absarokee, MT 59001
2. Gene & Linda Erlenbush, Box 128, Absarokee, MT 59001
3. Allen Petersen, 2236 Dallas Dr., Billings, MT 59102
4. Donald N. Petersen, W. 313 Brierwood, Spokane, WA 99218
5. George & Iona Broadwater, Rt. 1 Box 125, Fishtail, MT 59028
6. Webster, Jeannie, Vernon & Averill Keller, Box 134, Fishtail, MT 59028
7. Robert & Marilyn Wagner, 2009 W. Forest Dr., Richfield, MN 55423
8. Doug Howard, Attorney, 219 N. 4th St., Box 926, Columbus, MT 59019
9. Charles & Mary Mussetter, Rt. 1 Box 124, Fishtail, MT 59028
10. William & Anna Leithead, Rt. 1 Box 127, Fishtail, MT 59028
11. Keith Kerbel, Billings Field Office (inter-department mail)
12. Dave Pengelly, Hearing Examiner (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Nicky J. Wylie

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 31 day of MAY, 1983, before me, a Notary Public in and for said state, personally appeared Nicky Wylie, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Olsen
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1/21/84

CASE # 28975

28975

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) PROPOSAL FOR DECISION
RIGHT NO. 28975-c43C BY WILLIAM R.)
MORSE)

* * * * *

Pursuant to the Montana Water Use Act and to the Contested Case Provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Columbus, Montana, on Janury 19, 1983.

STATEMENT OF THE CASE

On September 3, 1980, an Application for Change of Appropriation Water Right was filed with the Department of Natural Resources and Conservation (DNRC) by William R. Morse. This application seeks to change the point of diversion of a water right claimed by the Applicant pursuant to MCA 85-2-201, et. seq. The Application claims a past use of water from the East Fork of Fiddler Creek of 1125 gallons per minute (gpm) up to 450 acre-feet per annum, with a priority date of May 15, 1965. The Application claims a diversion point in the SW1/4 NE1/4 NE1/4, Section 34, Township 5 South, Range 17 East, M.P.M., Stillwater County. The claimed period of appropriation is May 15 to November 15, inclusive, of each year. The claimed use is 1125 gpm up to 450 acre-feet for irrigation purposes on 30 acres

located in the NE1/4 NE1/4, Section 34, Township 5 South, Range 17 East, M.P.M., Stillwater County. The claimed means of diversion is a pump. This Application seeks to change the point of diversion to a point in the SW1/4 SW1/4 NE1/4 of Section 34, Township 5 South, Range 17 East, M.P.M., Stillwater County. The Application also seeks to change the diversion means from a pump system to a gravity flow ditch system.

The pertinent portions of this application were duly published for three successive weeks in the Stillwater County Citizen, a newspaper of general circulation printed and published in Columbus, Montana.

The Applicant, Mr. William R. Morse, appeared at the hearing and represented himself. Also, appearing as a witness on behalf of the Applicant was Mr. Fred Udenberg. Also, Mr. Ed Von Saggern of the Soil Conservation Service (SCS) presented testimony during the Applicant's case at the hearing. Mr. Von Saggern was requested to appear at the hearing by Mr. Doug Howard, counsel for several of the Objectors.

An objection to the granting of this application was filed with the DNRC by Robert M. and Marilyn Jane Wagner. These Objectors generally allege and complain that there is not sufficient unappropriated water for any new appropriations and the application if granted would dry up the East Fork of Fiddler Creek to the detriment of prior appropriators. These Objectors did not appear at the hearing but were represented by legal counsel, Mr. Doug Howard.

An objection to the granting of this application was filed

with the DNRC by Gene C. and Linda G. Erlenbush. These Objectors generally allege and complain that there are insufficient unappropriated waters in the source of supply for the granting of this application and any further appropriation would dry up the East Fork of Fiddler Creek to the detriment of prior appropriators. These Objectors appeared at the hearing and were represented by legal counsel, Mr. Doug Howard.

An objection to the granting of this application was filed with the DNRC by Mr. Allen Petersen. This objection generally alleges and complains that there are no unappropriated waters in the source of supply and any further appropriation by the Applicant would dry up the East Fork of Fiddler Creek to the detriment of prior appropriators. This Objector did not appear at the hearing but was represented by legal counsel, Mr. Doug Howard.

An objection to the granting of this application was filed with the DNRC by Mr. Donald N. Petersen. This objection generally alleges and complains that there are no unappropriated waters in the source of supply and any further appropriation by the Applicant would dry up the East Fork of Fiddler Creek to the detriment of prior appropriators. This Objector did not appear at the hearing but was represented by legal counsel, Mr. Doug Howard.

An objection to the granting of this application was filed with the DNRC by George K. and Iona Broadwater. This objection generally alleges and complains that there are no unappropriated waters in the source of supply and any further appropriation by

the Applicant would dry up the East Fork of Fiddler Creek to the detriment of prior appropriators. These Objectors appeared at the hearing and were represented by legal counsel, Mr. Doug Howard.

An objection to the granting of this application was filed with the DNRC by Charles R. and Mary J. Mussetter. These Objectors generally allege and complain that the Applicant was filing for more water than the creek carried and such application if granted would adversely affect the Objector's stockwater and existing irrigation rights. These Objectors appeared at the hearing and were represented by legal counsel, Mr. Doug Howard.

An objection to the granting of this permit was filed with the DNRC by Willis and Anna M. Leithead. These Objectors generally allege and complain that there are no unappropriated waters in the source of supply and that the application, if granted, would dry up the East Fork of Fiddler Creek to the detriment of prior appropriators. These Objectors sent a letter to the Hearing Examiner prior to the hearing stating that they did not intend to appear at the hearing and wished to have the matter dropped.

An objection to the granting of this application was filed with the DNRC by Webster, Jeannie, Vernon, and Averill Keller. These Objectors generally allege and complain that there are no unappropriated waters in the source of supply and the granting of this application would dry up the East Fork of Fiddler Creek to the detriment of prior appropriators. Vernon Keller appeared at

the hearing and was represented by legal counsel, Mr. Doug Howard.

Mr. Keith Kerbel, Area Office Field Supervisor for the Department's Billings Field Office, appeared and represented the DNRC at this hearing. Also appearing at the hearing on behalf of the Department was Mr. John Sanders, of the Department's Water Development Bureau.

EXHIBITS

The Applicant offered the following exhibits into evidence, to-wit:

- A-1: A hand drawn map depicting the source of supply, the Applicant's existing and proposed points of diversion, Applicant's place of use, and general outline of other properties in the vicinity of the Applicant's.
- A-2: An executor's deed between Irvin M. Black, executor of the estate of Charles Rumiano, and William R. Morse for 160 acres in the N1/2 of the NE1/4 of Section 24 and the E1/2 of the SE1/4 of Section 27, Township 5 South, Range 17 East, M.P.M., Stillwater County.
- A-3: A statement by a Mr. Donald Hatle dated November 15, 1979, suggesting that Mr. Morse change an existing gasoline operated pumping plant to a gravity flow ditch system.
- A-4: A statement by a Barbara Mussetter Nystul dated November 15, 1979, stating that she had personal knowledge of pump irrigation on property owned by Mr.

Bill Morse as far back as the summer of 1974.

A-5: A statement by Mr. Robert T. Eaton dated November 15, 1979, stating that he had personal knowledge of pump irrigation on property owned by Mr. Morse for a period of approximately 10 years.

A-6: A statement by a Mr. K. E. Adams dated November 15, 1979, stating that he had loaned a portable pump to Mr. Morse for pump irrigation purposes for a period of 7 to 8 years prior to the date of this statement.

A-7: An affidavit signed by a Mr. Dan Basta on January 14, 1982, stating generally that the affiant is familiar with pump irrigation on property of William Morse commencing in the summer of 1976.

A-8: A letter from Mr. William R. Morse to several individuals requesting cooperation in cost sharing through the SCS on the repair of an existing irrigation ditch and headgate.

The Applicant's exhibits were introduced into the record with no objections.

The DNRC offered the following exhibits into evidence, to-wit:

D-1: A photograph taken on October 7, 1981, by Keith Kerbel depicting the Applicant's irrigation ditch.

D-2: A photograph taken on October 7, 1981, by Keith Kerbel showing the headgate across the East Fork of Fiddler Creek in relation to the Applicant's inlet to his ditch.

- D-3: A photograph taken October 7, 1981, by Keith Kerbel showing the 48 inch culvert and diversion headgate on East Fork of Fiddler Creek.
- D-4: A photograph taken October 7, 1981, by Keith Kerbel depicting the 18 inch culvert inlet for the Applicant's ditch.
- D-5: A memorandum from Keith Kerbel to File No. 28975-c43C.
- D-6: A map from the Stillwater County Soil Survey depicting the soils in the vicinity of the Applicant's property and irrigation ditch.
- D-7: An SCS aerial photograph depicting the Applicant's point of diversion, ditch and place of use.
- D-8: An SCS aerial photograph depicting the Applicant's diversion point, ditch and place of use.
- D-9: Township 5 South, Range 17 East of the map portion of the Stillwater Water Resources Survey, depicting the Applicant's old and new points of diversion, irrigation ditch and place of use.
- D-10: A copy of a USGS quad map showing the Applicant's proposed diversion point and place of use on East Fork of Fiddler Creek and Objector Leithead's point of diversion from Fiddler Creek.
- D-11: Statement of Claim No. W-45578 by George and Iona Broadwater, including a map filed with said claim.
- D-12: Statement of Claim No. W-30609 filed by Willis and Anna Leithead, with attached map filed with said claim.

- D-13: Statement of Claim No. W-17341 filed by Allen and Morris Petersen with map filed with said claim.
- D-14: Statement of Claim No. W-17340 filed by Donald and Louanne Petersen along with a map filed with said claims.
- D-15: Statement of Claim No. W-30660 filed by Webster and Vernon Keller along with a map filed with said claim.
- D-16: Statement of Claim No. W-30664 filed by Webster and Vernon Keller along with the map attached to said claim.
- D-17: A sheet of calculations prepared by Mr. Keith Kerbel on January 12, 1983, quantifying the flow of water in the Applicant's ditch.
- D-18: A sheet of values for headloss coefficients for circular and square conduits flowing full as prepared by the SCS.
- D-19: Pages 72, 314, 315, and 316, of the Order of the Board of Natural Resources establishing water reservations in the Yellowstone River Basin (this exhibit was incorporated by reference at the hearing).

The Department's exhibits were received into evidence without objection.

PROPOSED FINDINGS OF FACT

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein and over the parties hereto, whether they have appeared or not.

2. The Applicant has filed a Statement of Claim of existing water right for 1125 gpm (2.5 cubic feet per second or 100 miner's inches) up to 300 acre-feet per annum for irrigation purposes on 30 acres. The priority date claimed is May 15, 1965.

3. The correct legal land description for the Applicant's proposed point of diversion is the NW1/4 NW1/4 SE1/4 of Section 34, Township 5 South, Range 17 East, M.P.M., Stillwater County.

4. The Applicant's ditch was designed by the SCS to carry a maximum of 9.6 cubic feet per second (cfs) at the point of diversion and to deliver approximately 4 cfs at the place of use.

5. The soils along the Applicant's ditch and in the field at the place of use are relatively porous.

6. Portions of the Applicant's conveyance ditch have been treated with bentonite to decrease the water loss which occurs where the ditch goes around a hill on the Mussetter property.

7. Any excess water applied to the Applicant's field returns to the East Fork of Fiddler Creek either by overland flow off the Applicant's property or by underground percolation to the source. This fact is evidenced by the increased streamflow which occurs below the Applicant's property at times when the Applicant is irrigating said property.

8. This Application for Change of Appropriation Water Right is proposed to be used in conjunction with waters applied for in Application for Beneficial Water Use Permit No. 45541.

9. Objector Kellers divert water upstream from the Applicant's proposed point of diversion.

10. Objector Mussetters divert water for irrigation purposes

above the Applicant's proposed point of diversion.

11. Objector Mussetter has instream stockwater rights below the Applicant's proposed point of diversion; however, the Applicant's conveyance facility passes through the Mussetters' property where Mussetters' livestock would have access to said water if the source of supply were dewatered below the Applicant's proposed point of diversion.

12. Objector Erlenbushes have no claimed water rights in the source of supply.

13. Objectors Wagners and Petersens claim diversion points downstream from the Applicant.

14. Objector Leitheads's existing diversion point on Fiddler Creek is upstream from the confluence of the East Fork of Fiddler Creek with Fiddler Creek.

15. The Applicant's existing place of use and purpose of use will not change as a result of this application.

16. Objector Broadwater diverts water from the source below the Applicant's proposed point of diversion; the Broadwaters irrigate approximately 50 acres and water approximately 35 animal units. No testimony was presented by the Broadwaters that the proposed change would adversely affect their existing rights.

PROPOSED CONCLUSIONS OF LAW

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein, and over the parties

hereto, whether they have appeared or not. MCA 85-2-402.

2. MCA 85-2-402 sets forth the exclusive criterion by which the present application for change must be tested, namely whether the proposed change will adversely affect the rights of other water users.

3. There was no showing by any of the Objectors that the Applicant's proposed change in location of his point of diversion would adversely affect any of their claimed water rights.

4. The Applicant's Statement of Claim attached to the application is prima facie evidence of the water right claimed by the Applicant in this matter. MCA 85-2-227.

PROPOSED ORDER

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following Proposed Order is hereby issued:

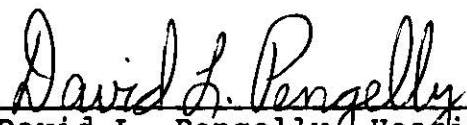
1. Application for Change of Appropriation Water right No. 28975-c43C is hereby granted to William R. Morse to divert 1125 gallons per minute up to 300 acre-feet per annum from May 15 to November, inclusive, of each year from the East Fork of Fiddler Creek at a point in the NW1/4 NW1/4 SE1/4, Section 34, Township 5 South, Range 17 East, M.P.M., Stillwater County. Said waters are to be used on 30 acres in the NE1/4 NE1/4 of Section 34, Township 5 South, Range 17 East, M.P.M., Stillwater County. Waters diverted pursuant to this change are to be used for irrigation purposes. Notice: the approval of this change is not to be construed as recognition by the Department of the water rights

involved. All rights are subject to possible modification under the proceedings pursuant to MCA 85-2-201 et. seq.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before MAY 6, 1983.

DONE this 15th day of April, 1983.



David L. Pengelly, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

AFFIDAVIT OF SERVICE
PROPOSAL FOR DECISION

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 19, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by William R. Morse, Application No. 28975, for an Application for Change of Appropriation Water Right, addressed to each of the following persons or agencies:

1. William R. Morse, Attorney at Law, Box 525, Absarokee, MT 59001.
2. Gene & Linda Erlenbush, Box 128, Absarokee, MT 59001
3. Allen Petersen, 2236 Dallas Drive, Billings, MT 59102
4. Donald N. Petersen, W. 313 Brierwood, Spokane, WA 99218
5. George & Iona Broadwater, Rt. 1, Box 125, Fishtail, MT 59028
6. Charles & Mary Mussetter, Rt. 1, Box 124, Fishtail, MT 59028
7. William & Anna Leithead, Rt. 1, Box 127, Fishtail, MT 59028
8. Webster, Jeannie, Vernon & Averill Keller, Box 134, Fishtail, MT 59028
9. Robert & Marilyn Wagner, 2009 W. Forest Dr., Richfield, MN 55423
10. Dave Pengelly, Hearing Examiner (inter-department mail)
11. Keith Kerbel, Billings Field Office (inter-department mail)
12. Doug Howard, Attorney, 219 N. 4th Street, Box 926, Columbus, MT 59019

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Cheryl L. Wallace

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 19th day of April, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

CASE # 28975

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Suey Lohr

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3/1/85

CASE # 28975